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E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. [redacted] 193

FRYD CONSTRUCTION CORPORATION and TRAVELERS INDEMNITY COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA, for the Use and Benefit of T/N PLUMBING & HEATING CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1622

FRYD CONSTRUCTION CORPORATION and TRAVELERS INDEMNITY COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA, for the Use and Benefit of T/N PLUMBING & HEATING CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The summary judgment (Pet. App. 12a-15a) entered by the district court (R 1022-1025) is not officially reported. The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 423 F.2d 980.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1970 (Pet. App. 10a-11a). Petition for rehearing was denied on April 13, 1970 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on May 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in a Miller Act suit commenced by a subcontractor to recover damages against the prime contractor and its surety, the subcontractor is entitled to an evidentiary trial on the merits to resolve disputed issues of fact.

STATEMENT

Respondent instituted suit against petitioners under the Miller Act (40 U.S.C., §§ 270a-270d) for monies it claimed to be due it arising out of its subcontract on a government construction job. The district court granted petitioners' motion for summary judgment while recognizing that they held a sum of money belonging to respondent (Pet. App. 14a-15a) under the subcontract. On the whole record, the court below reversed petitioners' summary judgment and remanded the case "* * * for a full evidentiary trial on the merits" because the disputes between the parties "cannot properly be resolved, therefore, by motion for summary judgment." Federal Rules of Civil Procedure, Rule 56.

ARGUMENT

1. There is no conflict with the decisions of this Court. On the contrary, the opinion below clearly agrees with prior opinions of this Court. See, e.g., *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620; *Poller* v. *Columbia Broad-*

casting System, Inc., et al., 368 U.S. 464; and Mr. Justice Black's dissent in *Beaufort Concrete Company* v. *Atlantic States Construction Company*, 384 U.S. 1004.

2. There is no conflict among the circuits. The issue decided in the court below turned on the application of Rule 56, Federal Rules of Civil Procedure, dealing with motions for summary judgment. On the record, the court below found that there were genuine issues of material fact which must be tried. While the issue presented by petitioner may be of limited importance to the construction industry, the present record on summary disposition contains neither findings based on litigation nor a comprehensive statement of agreed facts. The consideration given *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, is appropriate. The Court there stated:

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

3. The decision of the court of appeals, that the entry of summary judgment was improper, is clearly correct and presents no issue warranting plenary consideration by this Court. Even though the district court recognized that at the time respondent instituted its Miller Act suit Fryd had withheld monies due the subcontractor, it resolved the factual issues involved and entered the summary judgment. This is clearly an improper application of the summary judgment rule.

Stripped to its essentials, the petitioner asks this Court to determine whether the court of appeals was right or wrong in reversing the summary judgment. The court below clearly determined from its review of the record that there was a head-on factual controversy as revealed by

the material before the district court. The affidavits and other exhibits contain sufficient underlying facts which, when viewed in the light most favorable to the respondent, raised genuine issues as to material facts. Consequently, summary judgment was improper. *United States v. Diebold, Incorporated*, 369 U.S. 654.

The record, which included affidavits, depositions, answers to interrogatories, pre-trial stipulation and other pleadings, plainly establishes that respondent was entitled to a full evidentiary trial of its claim for labor and materials furnished pursuant to its subcontract and required for the performance of the prime contract.

The affidavit of Jerome Nagelbush (R 294) states that the actual, reasonable and necessary costs incurred by respondent over a period of one year were $147,840.99 in the performance of the drainage structures portion of the subcontract; that the costs were occasioned by thirty-two obstructions not shown or incorrectly shown on the plans; that the job required 365 days instead of 88 days as scheduled by respondent, which schedule was confirmed by petitioners and the government; and that petitioners agreed to pay the necessary, reasonable and actual costs and ordered respondent to do the work which resulted in such costs. The obstructions encountered were described fully in the exhibit attached to the affidavit. The affidavit of Jacob Rothfarb (R 311), certified public accountant, confirmed the expenditure of costs of $147,840.99. The affidavit of Jerome E. Saladino (R 306) confirmed that he was a graduate engineer; that he bid the job for respondent at $66,140; that the bid was accurate and the on-site investigation gave no indication of the obstructions that were not shown or incorrectly shown by the plans; that the job had to be performed as if "skating on thin ice" and that the estimate or bid was worthless because

of the unshown and incorrectly shown obstructions. The affidavit of Roland E. Wile (R 309), respondent's general superintendent, confirmed that the obstructions made the job a series of unpredicted stops and interferences.

In *Illinois Surety Co.* v. *John Davis Co.*, 244 U.S. 380, Mr. Justice Brandeis said:

> "In every case which has come before the Court where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. *Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this Statute.*" (Emphasis supplied)

There is no question but that respondent is entitled to damages under the Miller Act for extra work done resulting from engineering errors and obstruction and delay. *Kincaid & King Construction Company* v. *U. S.*, 333 F.2d 561 (CA 9 1964).

The respondent incurred costs of $155,340.99, which includes $147,840.99 in costs attested by the affidavit of Jacob Rothfarb, CPA, plus $7,500.00 for expenses incurred with respect to respondent's superintendent, Roland E. Wile, and tools and equipment consumed on the job. Respondent's overhead was $15,534.10 or a total of $170,875.09. It was entitled to a profit of $17,087.51, or a total of $187,962.60. Respondent incurred backcharges of $4,743.20 and $84.30, or a total of $192,790.10.

The Miller Act is highly remedial in nature and should be construed liberally. *Fleisher Engineering Co.* v. *United States for Use and Benefit of Hollenbeck*, 311 U.S. 15. It represents a congressional effort to protect persons supplying labor and material for federal buildings. *United*

States for Use and Benefit of Sherman v. *Carter*, 353 U.S. 210.

The district court in granting the summary judgment determined that respondent could not avail itself of federal rights provided under the Miller Act and dismissed the cause (Pet.App. 15a) although it ordered petitioners to pay out money to others that they owed respondent. The court of appeals correctly disagreed.

It is now up to the district court, on full evidentiary trial, to apply the proper rules of law to the facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 1970